

**KENTUCKY PERSONNEL BOARD
MINUTES OF JULY 11, 2014**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on, July 11, 2014, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David F. Hutcheson, Jr., Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Amanda Cloyd, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

Board Personnel Absent:

David B. Stevens, Member

Swearing in of newly elected Board members

The first order of business was to swear in the newest Merit Employee Board Members, Mr. Larry Gillis and Ms. Amanda Cloyd, who were elected by their fellow merit employees. General Counsel Boyce A. Crocker administered the oath of office. Mr. Gillis, Vice Chairman, is serving his second elected term. [Mr. Gillis and Ms. Cloyd will serve four-year terms which expire on June 30, 2018.]

2. **READING OF THE MINUTES OF REGULAR MEETING HELD JUNE 16, 2014**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Hutcheson moved to approve the minutes, as submitted. Mr. Gillis seconded and the motion carried 5-0. The Board members signed the minutes.

[Mr. Blevins arrived at 9:45.]

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Sipek congratulated the new Board members and stated he looked forward to working with Ms. Cloyd and to continue working with Mr. Gillis. He also advised that if there is anything they need to feel free to ask staff for assistance. Mr. Sipek also stated that former Board Member Ms. Ramona Herndon was an asset to the Board; she gave the Board a unique perspective and will be missed.

Mr. Sipek advised that with the beginning of the 2014-2015 Fiscal Year, the Board added two new contract Hearing Officers, the Hon. Darrin Embry and the Hon. Brenda Allen. Both Hearing Officers have come in and observed hearings at the Board. In addition, the Board had sufficient funds in the budget to cover contract hearing officers' expenses to the end of the last fiscal year.

4. PERSONNEL CABINET'S REPORT

Ms. Dinah Bevington, Executive Director, came forward to present the Personnel Cabinet's report.

Ms. Bevington reported that the July 1, 2014, deferral of employee paychecks went smoothly. This has been part of the budget bill for the past four years, and will continue into the current biennial budget.

Ms. Bevington advised that the Kentucky Employee Health Plan has switched providers and beginning January 1, 2015, Anthem will replace Humana. The Cabinet does not anticipate any major disruption. Enrollment will begin in October 2014.

Kentucky Employees Charitable Campaign (KECC) events are coming up. In August KECC will have its second annual golf tournament at the Wildwood Country Club and a 5K in October in Louisville.

Following the Personnel Cabinet's report, Chairman Sapp then called the parties forward for the first oral argument.

5. **ORAL ARGUMENTS**

A. ~~Charles Bengé v. Justice and Public Safety Cabinet (Corrections)~~
(Moved to August)

B. **Anthony Bledsoe v. Labor Cabinet (2013-201)**

Present for oral arguments were Appellant, Anthony Bledsoe, and counsel for Appellee, the Hon. Cannon Armstrong. After presenting oral arguments, the parties answered questions from the Board.

C. **Bethany Cook v. Justice and Public Safety Cabinet (Corrections) (2013-098)**

Present for oral arguments were counsel for Appellant, the Hon. Mike Moulton, and counsel for Appellee, the Hon. Amber Arnett. After presenting oral arguments, the parties answered questions from the Board.

D. **Kimberly Curtis v. Cabinet for Health and Family Services (2013-248)**

Present for oral arguments were counsel for Appellant, the Hon. Paul Fauri, and counsel for Appellee, the Hon. Carrie Cotton. After presenting oral arguments, the parties answered questions from the Board.

E. **Daniel Fuqua v. Transportation Cabinet (2011-254, 2012-070 and 2012-242)**

Present for oral arguments were counsel for Appellant, the Hon. Paul Fauri, and counsel for Appellee, the Hon. Will Fogle. After presenting oral arguments, the parties answered questions from the Board.

6. **CLOSED SESSION**

Mr. Blevins moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Mr. Hutcheson seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 6-0. (11:20 a.m.)

Mr. Gillis moved to return to open session. Mr. Blevins seconded and the motion carried 6-0. (1:00 p.m.)

7. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. ~~Charles Bengé v. Justice and Public Safety Cabinet (Corrections) (2013-217)~~
Moved to August

B. **Anthony Bledsoe v. Labor Cabinet (2013-201)**

Mr. Hutcheson moved to note Appellee's exceptions and oral arguments and to defer this matter to the next Board meeting. Mr. Blevins seconded and the motion carried 5-0, with Mr. Gillis recusing due to a personal relationship with a witness.

C. **Bethany Cook v. Justice and Public Safety Cabinet (Corrections) (2013-098)**

Judge Chandler moved to note Appellee's exceptions, Appellant's response, oral arguments and to remand this matter back to the hearing officer as the Board finds the notice of dismissal sufficient. Mr. Gillis seconded and the motion carried 6-0.

D. **Kimberly Curtis v. Cabinet for Health and Family Services (2013-248)**

Mr. Hutcheson moved to note Appellant's exceptions, Appellee's response, oral arguments and to accept the recommended order dismissing the appeal. Mr. Blevins seconded and the motion carried 6-0.

E. **Daniel Fuqua v. Transportation Cabinet (2011-254, 2012-070 and 2012-242)**

Ms. Cloyd moved to note Appellee's exceptions, Appellant's response to Appellee's exceptions, Appellee's response to Appellant's exceptions and oral arguments and to defer this matter to the next Board meeting. Judge Chandler seconded and the motion carried 6-0

F. **John Odom v. Education and Workforce Development Cabinet (2013-233)**
Deferred from June

Mr. Hutcheson moved to note Appellant's exceptions, Appellee's response and to accept the Final Order, as attached to the minutes, dismissing the appeal. Mr. Gillis seconded and the motion carried 6-0.

G. Ronyeld Shirley v. Justice and Public Safety Cabinet (2013-249)
Deferred from June

Mr. Gillis moved to note Appellant's exceptions, Appellant's additional exceptions, oral arguments, and to accept the Final Order, as attached to the minutes, sustaining the appeal to the extent that the suspension of Appellant be rescinded, and that a written reprimand be substituted. Mr. Blevins seconded and the motion carried 6-0.

H. Christopher Thomas v. Energy and Environment Cabinet (2013-291)
Deferred from June

Mr. Blevins moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the Final Order dismissing the appeal as attached to the minutes. Mr. Hutcheson seconded and the motion carried 5-0, with Mr. Gillis recusing due to a personal relationship with a witness.

I. Brenda Zahn v. Cabinet for Health and Family Services (2013-219)
Deferred from June

Mr. Hutcheson moved to note Appellee's exceptions, Appellant's response and oral arguments and to defer this matter to the next Board meeting. Mr. Blevins seconded and the motion carried 6-0.

J. Jason Callebs and Harvey L. Kuhl, II v. Transportation Cabinet and David Hoffman (2013-239 and 2013-231)

Ms. Cloyd moved to note Intervenor Hoffman's exceptions and Appellant Callebs' response and to accept the recommended order, with clerical correction, sustaining the appeal to the extent of rescinding the promotion and redoing the promotional process. Mr. Gillis seconded and the motion carried 6-0.

K. Kimstance Johnson v. Justice and Public Safety Cabinet (Corrections)
(2013-216)

Mr. Hutcheson moved to note Appellant's exceptions and Appellee's response and to remand this matter back to the hearing officer for the purpose of addressing the disability discrimination issue. Judge Chandler seconded and the motion carried 6-0.

L. Anne Marie Bisard v. Cabinet for Health and Family Services (2014-002)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 6-0.

M. Leslie Brown v. Justice and Public Safety Cabinet (Corrections) (2013-078)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 6-0.

N. Stanley Kinnis v. Justice and Public Safety Cabinet (Corrections) (2014-035)

Mr. Blevins moved to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 6-0.

**O. Michael McDonald v. Justice and Public Safety Cabinet (Corrections)
(2014-009)**

Mr. Blevins moved to accept the recommended order dismissing the appeal. Judge Chandler seconded and the motion carried 6-0.

P. Stevie Slone v. Transportation Cabinet (2013-126)

Judge Chandler moved to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 6-0.

**Q. Charles Weaver v. Transportation Cabinet and Personnel Cabinet
(2013-277)**

Mr. Gillis moved to accept the recommended order dismissing the appeal. Mr. Blevins seconded and the motion carried 6-0.

8. WITHDRAWALS

Mr. Hutcheson moved to accept the following withdrawals of appeals *en bloc* and dismiss the appeals. Judge Chandler seconded and the motion carried 6-0.

- A. Sheila Alexander v. Justice and Public Safety Cabinet (Juvenile Justice)
- B. Sarah Henry v. Education and Workforce Development Cabinet
- C. Ralph Wilson v. Transportation Cabinet (2 appeals)
- D. Baize, Sapp and Geary v. Justice and Public Safety Cabinet (Juvenile Justice)
(3 appeals)
- E. Jeremy Blackburn v. Public Protection Cabinet
- F. Holly Mitchell-Dickinson v. Personnel Cabinet and Cabinet for Health and Family Services

9. **SETTLEMENTS**

- A. Jerry Williams v. Justice and Public Safety Cabinet (Juvenile Justice)
(Deferred from June Meeting)
- B. Larry Graves v. Cabinet for Health and Family Services
- C. Kimberly Minter v. Department of Agriculture
- D. Carl Ishmael v. Cabinet for Health and Family Services
- E. Laura Penn v. Department of Public Advocacy
- F. Sarah Tucker v. Energy and Environment Cabinet
- G. Charles Blythe v. Finance and Administration Cabinet (Mediated)

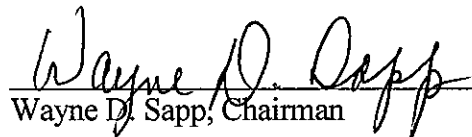
Mr. Gillis moved to reject settlement "A." Mr. Hutcheson seconded and the motion carried 5-0, with Ms. Cloyd abstaining.

Mr. Blevins moved to reject settlement "B." Judge Chandler seconded and the motion carried 5-0, with Ms. Cloyd abstaining.

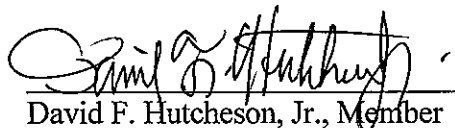
Mr. Hutcheson moved to accept settlements "C through G" as submitted by the parties, and to sustain the appeals to the extent set forth in the settlements. Mr. Gillis seconded and the motion carried 6-0.

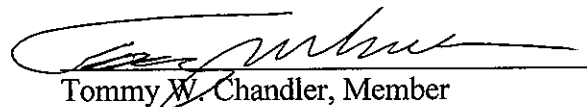
10. **OTHER**

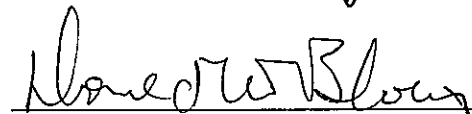
There being no further business, Mr. Blevins moved to adjourn. Mr. Hutcheson seconded and the motion carried 6-0. (1:10 p.m.)

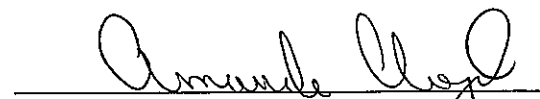

Wayne D. Sapp, Chairman


Larry Gillis, Vice Chairman


David F. Hutcheson, Jr., Member


Tommy W. Chandler, Member


Donald W. Blevins, Member


Amanda Cloyd, Member

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-233**

JOHN ODOM

APPELLANT

V.

**FINAL ORDER SUSTAINING
HEARING OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER
AS ALTERED**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular July 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 14, 2014, having noted Appellant's exceptions, Appellee's response, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Background paragraph 8 and substitute the following:

8. Mark White, Director of Human Resources for the Cabinet, and Lisa Cochran, Branch Manager, Support Branch, Division of Unemployment Insurance for the Cabinet, explained that Toby Thompson worked in a section which was just renamed and not abolished. Odom, however, was transferred into a newly created "support branch" in which there were no sections and no need for a section supervisor. Odom's former section, the Appeals Clerical Section, was abolished by the reorganization.

B. **Delete** Finding of Fact paragraph 1 and substitute the following:

1. There are no factual disputes in the testimony of the witnesses, John Odom, Mark White, and Lisa Cochran. Testimony of Dustin Adams is noted, but not relevant to the single issue of age discrimination. It is found by a preponderance of the evidence and by stipulation that John Odom is 42 years old, Toby Thompson is 34 years old, and Bill Morris is 66 years old. Odom and Thompson did not have "status" in the positions to which they were promoted, whereas Morris did. Of course, Morris is in the same age-protected class as Odom. Although Thompson was on promotional probation as a Section Supervisor, he was not similarly situated to Odom because Thompson's section was just renamed and not abolished. Odom was transferred into a newly created "support" branch which had no sections and could not support a section supervisor. Odom's former section, the Appeals Clerical Section, was abolished by the reorganization.

C. **Delete** Conclusion of Law paragraph 3 and substitute the following:

3. If Odom can establish a *prima facie* case, then the Cabinet has the burden to prove a legitimate reason for its decision to revert him. If the Cabinet shows it had a legitimate reason, the burden shifts back to Odom to show the reason was a pretext for the reversion. We need not go that far. Odom, although in a protected class, did not prove another employee under the age of 40 was promoted to the position he sought. Nor did he prove that a person younger than he and "similarly situated" was treated more favorably than he during the Cabinet's reorganization. Odom pointed to Toby Thompson, age 34, as an employee more favorably treated. Although neither Thompson


nor Odom had "status" in their newly promoted positions, the positions were handled differently by the reorganization. Thompson's position was simply renamed and not abolished. Odom's position and his section, the Appeals Clerical Section, was abolished by the reorganization. Odom was transferred to a newly created support branch, which did not contain sections and did need a Section Supervisor. Odom had the burden to prove that he and Thompson were "similarly situated" in all material respects to prove disparate treatment. *Loesel v. City of Frankenmuth*, 692 F.3d. 452, 463 (6th Cir. 2012). He failed to meet the burden.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **DISMISSED**.

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Rosemary Holbrook
John Odom

5. On one occasion, when Thomas was working with Sarah Shewmaker, she said she had to go to the bathroom. Thomas said while she was gone he tried to figure out where they could go to find a better working place with access to water to mix with the chemicals. The next day he learned he was being accused by the women that he was watching them going to the bathroom. He described the accusations as petty, ridiculous and disgusting, and complained that he was being treated like he was a pervert. He

testified that the last thing he would want to do was watch a female go to the bathroom, and that the accusations against him were false, without proof and offensive.

B. **Delete** Statement of Factual Evidence Presented paragraph 10, and substitute the following:

10. Shewmaker testified that a typical work day involves packing the powdered chemical insecticide and jugs of water to a site with trees to be treated, mixing the chemical in the jugs and treating the trees. She described the insecticide chemical as being contained in a small package, which is opened at the site and mixed with water they pull from a stream into a jug. She stated that each of the employees involved in treating the trees is required to have a license that certifies they are trained in handling pesticides.

C. **Delete** Statement of Factual Evidence Presented paragraph 22, and substitute the following:

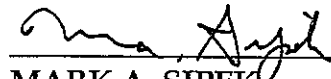
22. **Alice Mandt** is employed with the Cabinet's Forestry Division as a Hemlock Treatment Coordinator, responsible for hiring crews for a nine-month work period of applying pesticide to treat trees for insects. She stated she obtained Thomas' name as a potential employee from a Pastor, and that she called Thomas and he expressed that he would be interested in a job. After she hired him, most of their communication was by e-mail.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **DISMISSED**.

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Cannon Armstrong
Christopher Thomas
Lynn Keeling Gillis
Sherry Butler

COMMUNWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-249

RONYELD, SHIRLEY

APPELLANT

VS. FINAL ORDER
ALTERING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** **

The Board at its regular July 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 19, 2014, having noted Appellant's exceptions, Appellant's additional exceptions, oral arguments and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Findings of Fact paragraphs 4, 5 and 6 and substitute the following:

4. The Board finds the e-mail sent to Appellant by her Supervisor, Amy Robey, did not constitute a direct order to come into work Sunday, but truly was a request.

5. The Board finds that while the Appellant should have communicated in some way with Robey to express her desire to be off that Sunday, the Board finds that the Appellee did not take into account Appellant's long, excellent work history in deciding to discipline her when a lesser corrective action would have sufficed for the perceived poor work performance.

B. **Delete** the Conclusion of Law and substitute the following:

The Board rejects the Hearing Officer's conclusion that the Appellee proved its case justifying the disciplinary action taken and instead concludes that the action taken was excessive and not taken with just cause. The Board concludes that a written reprimand as corrective action to be more in-line with the actual conduct of Appellant. The Board notes this is the action anticipated by Appellant's supervisor.

C. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **RONYELD SHIRLEY VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-249)** be **SUSTAINED to the extent** that the suspension of Appellant be rescinded, and that a written reprimand be substituted. The Board further orders that the three-day suspension be expunged from Appellant's record, that she be awarded three days' back pay, and to otherwise make Appellant whole. **FURTHER**, the Appellee is to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board. KRS 18A.105, 18A.095(25), and 200 KAR 12:030.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **SUSTAINED to the extent** herein.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Stafford Easterling
Ronyeld Shirley
Stephanie Appel